IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 148 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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YUSUFKHAN MEHMOODKHAN PATHAN

Versus

HEIRS OF HAZI MOHAMADBHAI HAZI DUDHWALA

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Appearance:

1. Civil Revision Application No. 148 of 2001

MR GIRISH D BHATT for Petitioner No. 1-3

MR MTM HAKIM for Respondent No. 1-1/2

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CORAM : HON'BLE MR.JUSTICE KUNDAN SINGH

Date of decision: 24/09/2003

ORAL JUDGEMENT

1. Regular Civil Suit No. 156 of 1977 was filed by the original plaintiff-landlord against the

tenants-petitioners herein for possession of the suit premises and that suit was compromised on the basis of the compromise pursis filed by both the parties on 13-4-1981, whereby the tenants-defendants were permitted to deposit the entire arrears of rent on or before 17-10-1981. Thereafter, the aforesaid civil suit was decreed for eviction in terms of the compromise arrived at between the parties on 13-4-1981 on failure to deposit the entire arrears of rent by the tenant within stipulated time, the tenant will be evicted from the rented premises and the decree will be treated for eviction of the tenant. On or before the stipulated time, the tenants-defendants did not deposit the entire arrears of rent, the plaintiff-respondent filed Execution Petition No.71 of 1983 on 27-2-1983 and during pendency of the said execution proceedings the original plaintiff died on 1-3-1986. Execution Petition No. 71 of 1983 was decided by the Executing Court on 18-10-1985 as disposed of in absence of plaintiff and for non-prosecution on behalf of the plaintiff. It is mentioned in the said order dated 18-10-1995 that if the defendants do not pay the outstanding amount of arrears of rent within the stipulated time mentioned in the order/decree, the plaintiff would be entitled for possession of the suit premises in question. The defendants-tenants filed Objection Application vide exh.7 wherein they have stated that they have already paid the entire amount of arrears of rent within the time limit mentioned in the order/decree. Therefore, the plaintiff is not entitled to recover possession of the suit premises on the basis of the compromise decree as against the Objection Application exh. 7 no reply or written statement was filed by the plaintiff. The plea that the objection raised by the defendants-tenants are not true. The objection application exh.7 produced the defendants-tenants was filed on 9-4-1984, even after lapse of 12 years' time. The plaintiff has not taken any step to controvert and deny the objections raised by the defendants-tenants and in absence of the plaintiff for non-prosecution on behalf of the plaintiffs, the said execution application was disposed of vide order dated 18-10-1995 by the Executing Court. Thereafter, the property was sold by the heirs of the original landlord to the present landlord. Thereafter, subsequent owners of the suit property filed Execution Petition No. 41 of 1997 on 5-12-1997 and the same was allowed by the Executing Court on 25-11-1999 and the Executing Court issued possession warrant as well as "jangam" warrant under Order 21 Rule 43 and 35 of the Civil Procedure Code on payment of process fee by 16-12-1999 stating therein that the present execution application exh. 7 was filed

by the present decree holder against the judgment debtor to recover the possession of the suit premises as per the decree passed in Regular Civil Suit No. 156 of 1977. The present decree holder (original plaintiff) had filed Execution petition No. 71 of 1983 and that was disposed of due to negligence and non-prosecution on behalf of the decree holder (original plaintiff). Hence, Execution Petition NO. 41 of 1997 was filed by the present decree holder against the present judgment debtors (original defendants). The judgment debtors had filed their reply to Execution Petition No. 41 of 1997 vide exh. 10 in which it is stated the present execution petition is not admitted and it is false. It was also mentioned that the present respondent no. 2 - Hajibhai Fakirmohammed Dudhwala who has filed the present Execution Petition has no right or power to file the execution petition and hence it deserves to be dismissed. Haji Mohammedbhai Dudhwala who has died before so many years and Hajibhai Fakirmohammed Dudhwala who has filed the present petition has no status and has not given any explanation in that regard and without joining heirs of deceased Haji Mahmadbhai as original decree holder as a party. The execution petition is not tenable in the eye of law and hence the same cannot be executed under the guise of "Darkhast" and no order can be passed in favour of the decree holder as Rent Suit No. 156 of 1977 was decreed on the basis of the compromise on 13-4-1981 and the execution petition filed on 5-12-1997 cannot be executed as it is time barred as it was filed after 12 years and also the decree was passed on the basis of the compromise holding that in case the entire amount of arrears of rent is paid by the tenants within specified period, the plaintiff-landlord will have no right to recover possession of the suit property and if the tenants-defendants fail to pay the same then the decree holder would be entitled to recover possession of the suit premises. The Executing Court also found that Execution Petition No. 41 of 1997 has been filed within the time limit as Execution Petition No. 71 of 1983 was disposed of for non-prosecution on 18-10-1995. The compromise decree dated 13-4-1981 has not been complied with as per the order and direction given in the decree and hence the decree holder filed Execution Petition No. 71 of 1983 but it was disposed of for non-prosecution due to negligence on the part of the decree holder on 18-10-1995 and therefore the decree holder has filed Execution Petition No. 41 of 1997 in which the judgment debtor had filed objection petition. Considering the fact that since the decree holder could not enjoyed the fruits of the decree for more than 30 years, he has filed the present execution petition and therefore the

execution petition deserves to be allowed in view of the several authorities cited by the learned advocate for the petitioner in support of his arguments and possession warrant and "Jangam" warrant were issued as per law vide order dated 25-11-1999. That order dated 25-11-1999 was challenged by the judgment-debtors defendants by way of preferring Civil Revision Application No. 23 of 1999 before the District Court, Vadodara which was dismissed by the learned 4th Extra Assistant Judge, Vadodara vide judgment and order dated 11-1-2001 holding that even after second execution petition , the tenants-defendants have not paid a single "pai" till 17-10-1981 and even after the order passed 11-1-2001 in the said civil revision application the tenants-defendants do not want to pay the arrears of rent and they want to nullify the decree on the ground that it is a penal decree and the suit decreed on the basis of the compromise cannot be said to be a penal decree as the judgment debtors defendants have not been penalised by the decree but the tenants-defendants were benefited by the compromise decree.

2. The contention of the learned counsel for the defendants-tenants that the decree holder had sold the suit property to Hajibhai Fakirmohammed Dudhwala who had filed Execution Petition No. 41 of 1997 as it was not specified in the sale deed that the decree has been transferred to Hajibhai Fakirmohammed. As per the sale deed the right of the seller to get the suit property vacated was transferred to the purchaser. Consideration for right, title and interest includes the total sale price paid by the purchaser to the seller. Hence, the Courts below held that the purchaser obtained the right to get the suit property vacated from the possession of the tenants-defendants. Thus, the decree holder has right to get the suit property vacated on the ground of default of payment of arrears of rent. It was also held by the Courts below that the decree holder is entitled to both; the arrears of rent as well as possession of the suit property as both the reliefs were granted in the decree which was passed with consent of the judgment-debtors. Accordingly, aforesaid Civil Revision Application was dismissed vide the judgment and order dated 11-1-2001.

3. Being aggrieved and dissatisfied by the judgment and order dated 11-1-2001 passed by the learned 4th Extra Assistant Judge, Vadodara in Civil Revision Application, No. 33 of 1999 the present civil revision application has been preferred by the tenants -defendants - judgment debtors before this Court.

4. Learned counsel for the petitioners submitted that the Court below have wrongly considered that the petitioners have not paid a single "pai" within the time prescribed by the compromise and thereafter till the date of the order passed by the Court below. He has placed certain photo-state copies of the lower court's record to show that on 21-9-1978 amount of Rs.500/- was deposited, on 7-10-1978 amount of Rs.1000/-, on 27-2-1980 amount of Rs.500/- was deposited, on 2-4-1980 Rs. 350/-, 24-7-1980 Rs.360/-, on 19-10-1981 amount of Rs.2000/- and on 23-10-1981 amount of Rs.2000/- was deposited.

5. Thus, it appears that the learned advocate for the petitioners did not point out to the lower court that required amount has been paid or relevant papers were not produced before the court below at the relevant time when the judgment and order on 11-1-2001 was passed. Therefore, it appears that some mistake has been committed by the Courts below regarding payment of arrears of rent or amount deposited by the petitioners-defendants but it is ascertained that the tenant had not deposited required amount in compliance with the compromise decree within stipulated timei.e. 17-10-1981.

6. Next contention of the learned counsel for the petitioners is that in the Court below the revision application is not maintainable but an appeal is maintainable in view of the full bench decision of this Court in the case of Pranshankar Shankarlal Joshi and others V. Fulsinhji Kesharsinhji Parmar, reported in AIR 1985 Gujarat 9, wherein it has been held as under :

"In 1953, when the proviso (I) was introduced to S.29 (1) of the Bombay Act, an appeal was competent against the determination of any question made under S.47 Civil P. C., and it was appealable as if it were a decree and the orders passed under S. 47 of the Code in execution proceedings were appealable. But after the Civil P.C. amendment in 1976, reference to S. 47 of the Civil P.C. is omitted from the definition of "decree" therein by the Amendment Act, 1976, holding that the C.P.C. mentioned in the Rent Act and the Rules made thereunder, would that code as it stood in 1953 when it came to be incorporated in the Rent Act and not as amended in 1976 and an appeal would therefore lie against the determination of any question u/s 47 of the

C.P.C. in execution proceedings under the Bombay Rent Act and Rules made thereof on the principle."

7. While on the other hand, learned counsel for the respondents contended that the revision application was filed by the petitioners themselves before the lower appellate court though the order was appealable as per the law laid down by the above decision of the Full Bench of this Court in the case of Pranshanker Shankarlal Joshi (supra). In the court below the petitioners could have made a request or prayer to treat the civil revision application as an appeal but they have not made any such prayer or request before that Court therefore the petitioners cannot be permitted to treat the civil revision application as an appeal against the impugned order passed by the Executing Court and the petitioners are barred by the principle of estoppel to say that the civil revision application filed by them the before the lower appellate court was not maintainable and the appeal could have been preferred against the impugned order passed by the Executing Court and this second revision application is not maintainable in the eye of law. He relied on the decision of this Court in the case of Parmar Bhimji Govind V. Heirs of Patel Velji Ramji, reported in 1996 (1) G.L.H. 606, wherein it has been observed as under :

"The tenant has preferred Regular Civil Appeal u/s 29 (1) of the Act and Civil Revision Application u/s 29 (3) of the Act, before the District Court against the order order passed by the Court below second revision application u/s 29(2) is not maintainable in this Court.

Obviously, a second revision, purportedly filed under Section 29 (2) of the said Act, is not competent. Section 29 (2) provides only for a revision to the High Court in matters where an order which is appealable, has already been decided in appeal. In cases where orders are not appealable, the only remedy available is by way of a revision to the District Court or the specified Court, under Section 29 (3) of the said Act, but certainly not by way of a revision to this Court under Section 29 (2) of the said Act. In this case, the revisional remedy under Section 29 (3) has been exhausted, and Section 29 of the said Act (and/or any other provision) does not contemplate any further revision."

8. He also relied on the decision of the Supreme Court in the case of Vishesh Kumar V. Shanti Prasad, reported in AIR 1980 SC 892, wherein it has been held as under :

> "The High Court is not vested with revisional jurisdiction under Sec. 115, over a revisional order made by the District Court under that section. To recognise a revisional power in the High Court over a revisional order passed by the District Judge would plainly defeat the object of the legislative scheme."

9. I have considered this contention of the learned counsel for the respondents regarding maintainability of second revision application in this Court. The provisions of Section 29 of the Bombay Rent Act or Section 115 of the Civil Procedure Code do not empower the High Court to have powers of revision against the order passed in revisional jurisdiction by the District Court, as it is a case. Moreover, revision application was preferred before the lower court against the order passed u/s 47 of the Civil Procedure Code and the petitioners-defendants have not made any prayer or request before the Court below that the revision application be treated as an appeal in place of the revision application. Even at this stage, it is considered that the revision application was filed by the petitioners before the District Court though that was not maintainable and the order passed by the court below in revisional jurisdiction can be treated as the order passed in regular appeal by the lower appellate court, this revision application can be justified on this line. The learned counsel for the petitioners could not pointed out anything that the Court below has exercised the jurisdiction as revisional court or as appellate court has committed any illegality or exceeded its jurisdiction in passing the impugned order. Even if we treat the order passed by the Court below in revisional jurisdiction as passed in appellate jurisdiction, this point could not be raised by the learned counsel for the petitioner that the Court below has committed an error in exercising revisional jurisdiction though that revisional jurisdiction could have been exercised as appellate jurisdiction. Moreover, in case, we hold that this revision application is not maintainable, the learned counsel for the petitioner can make a prayer that this revision application may be permitted to be withdrawn and to give liberty to file a separate writ petition u/s 227 of the Constitution of India as if the order has been passed under revisional jurisdiction u/s 115 of the Civil

Procedure Code. In order to avoid in the interest of justice that situation and multifarious litigations, we can treat the order passed by the District Court as if the order is passed by the appellate Court.

10. The next contention of the learned counsel for the petitioners is that the compromise decree was passed on 13-4-1981 in Rent Suit No. 156 of 1977. First Execution Petition was filed on 22-2-1983 and that execution was disposed of on merit of the case and it was observed by the court below that the plaintiff was entitled to recover possession of the suit premises on the basis of the compromise decree. Hence, second Execution Petition No. 41 of 1997 filed on 5-12-1997 is not maintainable, on two grounds; firstly the order passed in Execution Petition No. 71 of 1983 on 18-10-1985 on merits of the case. Hence, Second Execution Petition No.41 of 1997 is not maintainable as barred by principle of res judicata. Secondly, the decree passed on the basis of the compromise on 30-4-1981 and that decree could have been executed within 12 years but for execution of that decree Execution Petition No. 41 of 1997 was filed on 5-12-1997 which is beyond the period of limitation prescribed by the Limitation Act. In this regard I have carefully gone through the order dated 18-10-1995 passed by the Court below whereby Execution Petition No. 71 of 1983 was decided which clearly shows that in absence of and non-prosecution on behalf of the plaintiff, said execution petition was disposed of. Meaning thereby is that the said execution petition has not been decided on merits. Even some stray observations made by the Execution Court regarding, the objection application filed by the defendants - tenants for non-prosecution of the aforesaid execution petition would not affect the character of the order whereby Execution Petition No. 71 of 1983 was decided. As such, aforesaid stray observations of the execution court below are not result on merit of Execution Petition No. 71 of 1983. As such, Execution Petition No. 71 of 1983 was not decided on merit but was decided for non-prosecution on behalf of the plaintiffs hence is not barred by principle of res judicata.

11. Learned counsel for the respondents-plaintiffs submitted that Execution Petition No. 71 of 1983 was dismissed not on merit but for non-prosecution on the part of the plaintiffs and hence Execution Petition No. 41 of 1997 is maintainable and not barred by the principle of res judicata nor in Limitation Act. In this respect, he has relied on the following decisions ;

(i) Decision of the Supreme Court in the case of Sheodan Singh V. Daryao Kunvar, reported in AIR 1966 SC 1332, wherein it has been observed as under :

> "In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial Court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of the parties or multifariousness, or on the ground that the suit was badly framed, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate, when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional Court-Fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res judicata in a subsequent suit"

(ii) Decision of the Supreme Court in the case of Shivshankar Prasad Shah and another V. Baikunth Nath Singh, and others, reported in AIR 1969 SC 971, wherein it has been held as under :

> "Before a plea can be held to be barred by res judicata, that plea must have been heard and determined by the Court. The dismissal for default of the judgment debtor of an application filed by him under Section 47, Civil P.C. resisting the execution of the decree is not a final decision of the Court after hearing the parties and therefore does not operate as res judicata and he can raise that objection in a subsequent application filed him."

(iii) Decision of this Court in the case of Caps and Containers & Another V. Bank of Baroda, reported in 2000 (2) G.L.R. 1701, wherein it has been observed as under :

> "Execution application had been filed which came to be rejected on 27th September, 1985. The present "Darkhast" was filed on 10th October, 1990. An objection has been raised that this

darkhast is barred by limitation as 12 years have already expired from the date of decree which objection as not accepted and the learned Executing Court issued the jangam warrant against the petitioners.

It is a case where the learned trial Court has rightly considered it to be a case of revival of the application and having taken into consideration the fact that the either two applications filed by the respondent for execution of the decree were dismissed only on the ground of non-removal of office objection. The objection that the execution is barred by limitation has been rejected."

12. I have considered the contentions raised by the learned counsel for the parties and perused the relevant case laws cited by them in support of their respective contentions. In the present case Execution Petition No.71 of 1983 was dismissed in default of the plaintiffs and that application was not decided on merits. In the light of the decision of the Supreme Court as well as of this Court as stated above, that application will not be deemed to have been decided on merits. Hence second execution petition being Execution Petition No. 41 of 1997 would not be barred by principle of res judicata and the same will be treated as revival of the earlier execution petition and would be considered as revival of the earlier execution petition which was dismissed for non-prosecution. As such the contention of the learned advocate for the petitioners that the second execution petition (No.41 of 1997) is barred by the principle of res judicata and limitation provided in the Limitation Act is not tenable.

13. Next contention of the learned counsel for the petitioners is that second execution being Execution Petition No. 41 of 1997 filed by the subsequent purchasers who are not entitled for arrears of rent and execution of the decree for eviction of the suit premises unless that right has been conferred or assigned to the subsequent owner by the previous owner of the suit property. In support of his arguments, he has relied on the decision of the Supreme Court in the case of N.M. Engineer and others V. Narendra Singh Virdi and another, reported in AIR 1995 SC 448, wherein it has been held as under :

"Where in a deed by which the right, title and interest in the property in dispute was released

in favour of one of the co-owners nowhere any assignment of rent was made, the assignee was not entitled to rent before assignment and the amount due prior to the deed could not constitute arrears of rent as it was merely an actionable claim. Consequently, notice demanding rent sent before the relinquishment deed by the co-owner was not valid. It was more so when, there was dispute as to amount of standard rent and the interim rent fixed by the small cause court was deposited by the tenant. Moreover, there was no arrears outstanding for the period of six moths on the date of notice and thus the notice did not satisfy requirement of S. 12 (3) (b) as it could not be said that the tenant had neglected to pay the rent. In such case, it was not open to the landlord to fall upon S. 12 (3) (b)."

14. I have considered this contention of the learned counsel for the petitioner. He has placed English translation of the sale deed dated 21-8-1997 on the record of this case executed by the heirs and legal representatives of previous owner of the suit property in favour of Hajibhai Fakirmohammed Dudhwala. The said sale deed contains the relevant recital as under :

"In this property, there are other two tenants and the rights which are vested in me, the person giving in sale for getting the above tenants vacated, the rights for getting the tenants vacated are also transferred to you, the person purchasing the property by this deed.

The above rights have been in the careful consideration which has been decided between us and therefore, the rights vesting in me, person giving property in sale for getting the tenants vacated have been sold to you along with the property by this sale and thus, by this sale those rights are vested/transferred in you."

15. From the above recitals made in the sale deed dated 21-8-1997, it appears that all the rights of the previous owner have been transferred and assigned to the subsequent owners of the suit property and the Courts below have considered this aspect. In this respect argument made by the learned advocate for the petitioners before the lower court that the decree holder has sold the suit property to Hajibhai Fakirmohammed Dudhwala, who has filed Execution Petition No. 41 of 1997, it is not clearly specified in the sale deed that the decree is

transferred to subsequent purchaser Hajibhai Fakirmohammed Dudhwala was rejected. According to the aforesaid sale deed, all the rights of the sellers for getting the suit property vacated were transferred to the subsequent purchaser. This right was included in the total price by the purchase from the seller. Hence, the subsequent purchaser obtained the right from the previous owner of the suit property to get the suit property vacated from the possession of the tenants-defendants. Therefore, decree holder has right to get the suit property on the ground of default in making payment of rent. I do not find any substance in this contention of the learned counsel for the petitioners.

16. The contention of the learned counsel for the petitioners is that there are also some other persons to be treated as tenants who have not been made parties to the execution proceedings, hence the execution proceedings are not sustainable in the eye of law. In support of his arguments, learned counsel for the petitioners relied on the following decisions.

(i) Decision of this Court in the case of Sudhakar Kashiram alias Kashinath Bhavsar and Another V. Nagindas Atmaram, reported in 1972 G.L.R. 536, wherein it has been held as under :

> "After death of the tenant, it would be open to any member of the tenant's family to agitate this question in the Court as to who shall be a tenant in the place of the tenant or in default by an order of the Court declaring any one member to be a tenant."

(ii) Decision of this Court in the case of Mohanlal Mansukhbhai Gandhi V. Punjiben d/o Nanabhai & Another, reported in 1977 G.L.R. 228, wherein it has been observed as under :

> "U/s 5 (ii) (c) of the Bombay Rent Act Contract Act on death of the statutory tenant any member of his family residing with him at the time of, or within three months immediately preceding his death, is entitled to become a tenant."

(iii) Decision of this Court Maganbhai Zaverbhai Patel V. Rameshbhai Bechardas Shah and Others, reported in 1975 G.L.R. 797, wherein it has been held as under :

> "Expression 'legal representative" as defined in Civil Procedure Code and also includes, in case

of joint family property, the joint family of which the deceased was

17. Learned counsel for the respondents submitted that this plea has not been raised before the Executing Court or before the District Court. Pursis was filed by the tenant himself and there is no statement in the said pursis that any other tenant in the suit property. Even according to the learned counsel for the petitioners, there is no other tenant in the suit to be joined. Even there was no other tenant tenant who had not been impleaded in the execution proceedings. It was the duty of the petitioners to raise this question before the court below and that question would have been decided and finding thereon could have been arrived at by the Court concerned. As such, this point is not tenable at this stage.

18. I have considered the above contention of the learned counsel for the petitioners. But I do not find any substance in this contention inasmuch as on death of any deceased tenant, there is no law that every member residing in the suit property would become tenant automatically. For this purpose, they might have right to live. But the tenant would be treated only responsible for the purpose of payment of rent. If that amount of rent is not paid then all the members of the family along with the person responsible for the payment of rent can be evicted. In the present case, compromise pursis was filed and that pursis was signed by the father of the petitioners and they cannot be permitted to say that there was any other member of the family of the tenant who is entitled to be impleaded as party in the execution proceedings as the execution proceedings have not been contested by any other person claiming to be tenant or family member of the tenant. It cannot be said that in absence of any necessary party or without joining any other necessary party to execution proceedings, the decree cannot be executed. Accordingly, the above contention raised by the learned counsel for the petitioners regarding joining of other member of the deceased tenant to the execution proceedings, if any, is not tenable in the eye of law.

(iii) Decision of this Court Maganbhai Zaverbhai Patel V. Rameshbhai Bechardas Shah and Others, reported in 1975 G.L.R. 797, wherein it has been held as under :

"The expression 'legal representative' in Sec. 5

(4) of the Bombay Rent Control Act means the 'legal representative' as defined in Civil Procedure Code and also includes, in case of joint family of which the deceased was a member. In the instant case, the legal representatives of deceased defendant no. 2 have been admittedly not brought on record.

However, that question has no bearing with the question in the instant case as the legal representatives of the deceased defendant no. 2 having not been brought on record, the suits abated against the defendant no.2 and in that view of nature of the suits necessary consequences of it would be that the suit in its entirety would abate under O. 22 R. 4 of C.P. Code."

19. On the contrary, the learned counsel for the respondents contended that the defendants appearing before the trial court in the suit proceedings agreed to arrive at consent terms and the pursis were filed for the compromise by the parties who are the petitioners before this Court. At no point of time, the plea has been raised by the defendants-tenants that there were other persons to be impleaded as necessary parties in the suit proceedings or at least in the compromise pursis.

20. Learned counsel for the respondents relied on the observations made in the decision of Full Bench of this Court in the case of Babubhai @ Jayantilal Kalyanbhai& Ors. V. Shah Bharatkumar Ratilal & Ors., reported in 1980 G.L.R. 103, wherein it has been observed as under :

"If both the parties before the Court agree that the question may be determined in the suit proceedings, the Court can straight way decide that question."

21. On the basis of the above observations made by the full bench of this Court, learned counsel for the respondents contended that there were only three defendants-tenants in the suit proceedings and at no point of time it was not suggested by any of them that any other person is also to be impleaded as a party in the suit proceedings. Moreover, three defendants who entered into the compromise pursis, are before this Court. As such, they cannot be permitted to say that any other party is required to be joined and in absence of other necessary party or person, the suit proceedings are vitiated. Therefore, considering the facts and

circumstances of this case, the defendants-tenants cannot be permitted at this stage to say that the execution proceedings are not maintainable. When no objection has been raised either before the trial Court or before the Executing Court or before the Revisional Court, when the revision application was filed by them. As such, I do not find any substance in this contention raised by the learned counsel for the petitioners.

22. The compromise decree has been challenged by the learned counsel for the petitioners on the grounds; firstly It contains penal clause. The consent terms contains two conditions (1) The defendants have to pay Rs.2,640/- on or before 17-10-1981 and (2) The defendants were required to pay mesne profits every month as and when the same fell due and if the defendants had paid mesne profits as mentioned earlier, the plaintiff was not to execute the decree for obtaining the possession of the rented portion of premises. In case, the defendants fails to pay the aforesaid amount within the specified period, the plaintiffs would be entitled to recover the possession. This is a penal case. Even the entire amount is deposited within the specified period and if the defendants fail to pay monthly mesne profit, then the plaintiffs would be entitled to recover possession of the suit premises. Stipulation in the compromise decree as regards payment of monthly mesne profits or rent for an indefinite period is penal. Second condition is rather vague and uncertain and against the provisions and spirit of the Bombay Rent Act and the compromise decree does not say as to upto what period the defendant was to act in accordance with the terms and conditions of the decree in execution. It is one month, ten months, hundred months, thousand months or infinite number of years. In support of his contentions, he has relied on the decision of this Court in the case of Lalsing Ramchandra V. Puspavati Girdharlal & Ors, reported in 1979 G.L.T. 65, wherein it has been held as under :

> "Clause 1 of the consent decree fixes the standard rent of the suit premises. Clause 2 provides that the defendant agrees to hand over possession of the suit premises on February 28, 1965 unconditionally. It further provides that if the defendant pays the full amount as mentioned in the plaint with costs of the suit and mesne profits from the date of the suit till February 28, 1965, before that date the plaintiff has not to recover possession from the defendant.

Reading clauses 2 and 3 together, there cannot be any doubt that the dominant intention of the parties in making the provision as regards recovery of possession of the suit premises from the defendant is to secure payment of money to be paid by the defendant under the aforesaid terms. The decree is essentially a money decree. In order to secure payment of money,the decree provided that in case the defendant committed default in making payment of money, the plaintiff would be entitled to recover possession of the suit premises holding that the decree which is sought to be executed is essentially money decree which cannot be executed for the purpose of securing possession of the suit premises."

23. The consent terms is filed by the parties whereby the standard rent was fixed at the rate even higher than what was demanded by the landlady and the tenant was required to pay the same. In support of his case, he has relied on the decision of this case in the case of Ramanlal M. Parmar V. Smt. Ambaben Hargovinddas, reported in 1995 (2) G.L.R. 1909, wherein it has been held as under :

"Consent terms filed whereby standard rent was fixed at a rate even higher than what was demanded by the landlady and the tenant was required to pay arrears of rent at such higher rate within stipulated period. Decree passed by Court as per consent terms without any application of mind as to whether rent proposed as standard rent was just and reasonable. Failure of tenant to pay arrears of rent within stipulated period in compliance of the terms of the decree. Such decree cannot be executed.

Once such deposit was required to be made within the time enlarged by the Executing Court, the penalty clause contained in the consent decree would automatically stand forfeited and tenant is entitled to claim relief against forfeiture. There was, therefore, no justification on the part of the Executing Court in issuing warrant for possession under Order 21 Rule 35 of the Code of Civil Procedure."

24. In the above decision of this Court in the case of Ramanbhai M. Parmar, time for payment was extended or enlarged by the Court concerned. But in the present case, there is nothing on record to show that the time

was extended by the Court for depositing the amount of arrears of rent and admittedly that amount of arrears of rent was not deposited within the time specified by the Court. After deposit of that amount, it is stated that there was closed Saturday and holiday of Sunday at the relevant time and hence the amount could not be deposited on the last date in the Court and the amount of arrears of rent was deposited on the next working day. He has also relied on the decision of the Full Bench of the Bombay High Court in the case of Waman Vishwanath Bapat V. Yeshwant Tukaram, reported in 50 B.L.5R. 688, wherein it has been held as under :

> "Where a decree, passed either by consent or in in invitum, permits payment of the decreetal amount in instalments and provides that on failure in payment of one or more instalments the whole amount of the decree would become payable at once, Courts are bound, in the event of such failure, to execute the decree in accordance with its terms, and are not at liberty to relieve against the consequences of failure on equitable considerations."

The above case of the Bombay High Court rather supports to the case of the other side i.e. respondents.

25. He has also relied on the observations made in the order dated 10-9-2003 rendered by this Court in Civil Revision Application No. 942 of 2002, wherein the property was transferred to the subsequent purchaser without assignment of rent. Subsequent landlord was not entitled to recover rent of the suit premises for the period prior to the date of sale deed. The facts of the present case are totally different than the facts of C.R.A. No. 942 of 2002. Hence, the observations made in that Civil Revision Application are not applicable in the present case.

26. I have considered the various contentions raised by the learned counsel for the parties. If the consent decree provides for eviction of the defendants-tenants on the failure to pay the arrears of rent and they do not pay the entire amount of arrears of rent within specified period the decree is executable in law. In the instant case, period of six months has been given for depositing entire arrears of rent and to pay rent of mesne profits regularly. This clause does not amount penal clause. However, the tenant is required to pay arrears of rent within specified period regularly and he if he does not pay the rent within the period of six months or more,

then the tenant is liable to be evicted. The tenant is under statutory obligation and he is required to pay or deposit amount of rent regularly. Moreover, those conditions are not violative of the statutory provisions of law. Such clause cannot be said to be illegal. This, the consent decree is perfectly legal and justified. Accordingly, I do not find any substance in the above contention raised by the learned counsel for the petitioners.

27. The rejection of the contention of the learned counsel for the petitioners is fortified on the basis of the Supreme Court decision.The Apex Court in the case of Prithvichand Ramchand Sablok V. S.Y. Shinde, reported in AIR 1993 SC 1929, wherein it has been observed as under :

"Eviction suit for possession of the demise premises was filed by the landlord mainly on ground of arrears of rent under S. 12 (3) of the Act. The suit was settled between the parties. A compromise decree was passed. By cls. (1) and (2) of the compromise terms, the tenant was required to deliver vacant possession of the demised premises together with arrears of rent etc. by a particular future date. It was further provided that if the tenant fails to deliver possession and defaults in paying the arrears due from him by the stipulated date the landlord will be entitled to recover both possession and arrears of rent etc. by executing the decree. Thereafter by cl. (3) of the consent terms, the tenant was given a concession, in that, if he pays the entire arrears of rent, mesne profits, electricity and water charges, cost of the suit, etc. by the stipulated date the landlord agrees not to execute the decree for possession.

As regards the question whether parties to the consent decree intended to create or constitute relationship of landlord and tenant, it is held, that if the condition precedent for availing of the benefit or concession under cl. (3) of the consent terms is satisfied, the relationship of landlord and tenant continues but if tenant fails to comply with the condition precedent for availing of benefit or concession the forfeiture operates and the tenant becomes liable for eviction under the decree."

28. The last contention of the learned counsel for the petitioners is that transferee of the decree is required to give notice to the tenant for the purpose of eviction under O 21 R. 16 of the Civil Procedure Code and in absence of any such notice by transferee, the proceedings of execution are vitiated. O. 21 R. 16 of the Civil Procedure Code, provides that the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree holder, and the decree shall not be executed until the Court has heard their objections (if any) to its execution.

29. I have also considered the above contention of the learned counsel for the petitioners in this respect that after filing Execution Petition No. 41 of 1997 on 5-12-1997, the notices were issued to the defendants-tenants and they also filed written objections vide exh. 10 to the said execution petition and as such full opportunity was given to the defendants-tenants. Hence, no question arises that any notice is required under O.21 R.16 of the Civil Procedure Code. As the notice was issued and served and objections were filed by the defendants-tenants and after considering the contentions of the learned of the parties and material on record, the aforesaid execution petition was decided by the Executing Court. As such, it cannot be said that execution proceedings are vitiated for noncompliance of the statutory provisions. Therefore, is no substance in this contentions of the learned counsel for the petitioners.

30. Considering the marathon submissions made by the learned counsel for the parties, material on record and the decisions of the Supreme Court and this Court cited by the learned counsel for the parties, I do not find any sufficient reason to call for interference with the concurrent findings of the Courts below in revisional jurisdiction u/s 29 (2) of the Bombay Rent Act. Therefore, the present Civil Revision Application is dismissed. Rule is discharged, with no order as to costs. Interim relief granted earlier by this Court stands vacated forthwith.

31. In the last, learned counsel for the petitioners requested this Court to stay operation, execution and implementation of the present order for a period of one week to enable the petitioners to approach higher forum.

Considering the facts and circumstances of the case, I do not see any good reason to accede the request of the learned counsel for the petitioners and according the same is refused.

(Kundan Singh, J.)

_/\/Satwara/